UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

TINA L. MAURICE,	***)***	
	)	
Plaintiff	***)***	
	)	
v.	***)***	***Docket No. 99-337-P-C***
	)	
STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,	***)***	
	)	
Defendant	***)***	

RECOMMENDED DECISION ON DEFENDANT'S MOTION TO DISMISS AND PLAINTIFF'S MOTION FOR LEAVE TO AMEND COMPLAINT

The defendant, State Farm Mutual Automobile Insurance Company, moves to dismiss this action asserting claims under two insurance policies, which it removed from state court. After the motion to dismiss was filed and fully briefed, the plaintiff moved for leave to amend her complaint to add a count sounding in *respondeat superior*. I recommend that the court grant the motion to dismiss and deny the motion for leave to amend.

I. The Motion to Dismiss

A. Applicable Legal Standard

The motion to dismiss invokes Fed. R. Civ. P. 12(b)(6), asserting that the amended complaint fails to state a claim upon which relief may be granted. "When evaluating a motion to dismiss under Rule 12(b)(6), [the court] take[s] the well-pleaded facts as they appear in the complaint, extending the plaintiff every reasonable inference in [his] favor." *Pihl v. Massachusetts Dep't of Educ.*, 9 F.3d

184, 187 (1st Cir. 1993). The defendant is entitled to dismissal for failure to state a claim only if "it appears to a certainty that the plaintiff would be unable to recover under any set of facts." *Roma Constr. Co. v. aRusso*, 96 F.3d 566, 569 (1st Cir. 1996); *see also Tobin v. University of Maine Sys*., 59 F.Supp.2d 87, 89 (D. Me. 1999).

B. Factual Background

The complaint makes the following relevant factual assertions. On November 5, 1997 the plaintiff's husband, David M. Maurice, while riding a motorcycle insured by the defendant, was struck and killed by an automobile driven by Bonnie A. Pike. Complaint, Attachment 1 to Notice of Removal (Docket No. 1), ¶¶ 2-3, 7-8, 10-11. The plaintiff has been duly appointed personal representative of the estate of David M. Maurice. *Id*. ¶ 4. Pike's insurer paid the plaintiff the policy limits of $50,000 on her claim arising out of the collision. *Id*. ¶¶13-14. The defendant's insurance policy on the Maurice motorcycle had uninsured and underinsured motorist coverage in the amount of $25,000 per person and $50,000 per accident. *Id*. ¶ 17.

At the time of the accident, the plaintiff and her husband owned two additional vehicles, each covered by a separate insurance policy issued by the defendant, each of which provided coverage in the amount of $100,000 per person and $300,000 per accident. *Id*. ¶¶16, 19-20. The defendant paid the plaintiff property damage benefits under the motorcycle policy and accidental death benefits in the amount of $5,000 under one of the other policies, both as a result of the accident. *Id*. ¶¶ 18, 21. The plaintiff demanded payment of the policy limits for underinsured motorist coverage under all three policies, and the defendant refused, citing the "owned vehicle/family member" exclusion in the non-motorcycle policies. *Id*. ¶¶ 24, 26-28.

The complaint alleges breach of the insurance policies by the defendant (Count I), a claim

for loss of consortium by the plaintiff (Count II) and breach of the duty of good faith and fair dealing (Count III).

C. Discussion

The complaint incorporates by reference excerpts from the relevant insurance policies. The language upon which the defendant relies is found in Section III of the non-motorcycle policies.

> THERE IS NO COVERAGE:
>
> * * *
>
> 2. FOR *BODILY INJURY* TO AN *INSURED*:
>
> a. WHILE *OCCUPYING* A MOTOR VEHICLE OWNED BY *YOU*, *YOUR SPOUSE* OR ANY *RELATIVE* NOT INSURED FOR THIS COVERAGE UNDER THIS POLICY . . . .

SECTION III — UNINSURED MOTOR VEHICLE — COVERAGE U, Exh. 5 to Complaint. Contending that only the motorcycle policy applied to the plaintiff's claim as a result of these exclusions, the defendant argues that it has no liability to the plaintiff, because the underinsured motorist limits of the motorcycle policy are lower than the amount paid by Pike's insurer. Defendant State Farm Automobile Insurance Company's Motion to Dismiss, etc. (Docket No. 7) at 4-8.

The plaintiff argues in response that the exclusion language violates 24-A M.R.S.A. § 2902-D and is accordingly void. Plaintiff's Response to Defendant's Motion to Dismiss ("Plaintiff's Memorandum") (Docket No. 9) at 1, 4-10. Apparently in the alternative, the plaintiff argues that she and her daughter[1] are entitled to benefits under all of the policies "under the doctrine of *Jack v. Tracy*, 722 A.2d 869 (1999) [sic]." *Id*. at 11.

[1] The complaint and the plaintiff's memorandum of law refer to Nicole Maurice as the "minor" daughter of the plaintiff and the decedent. Complaint ¶ 2; Plaintiff's Memorandum at 11. However, the complaint alleges that Nicole was born on February 16, 1981, Complaint ¶ 2, more than 18 years before the complaint was signed on October 8, 1999, *id*. at [9], and the memorandum was filed on December 21, 1999, Docket.

The statute invoked by the plaintiff provides:

> An insurer may not sell or renew a motor vehicle liability insurance policy on or after January 1, 1994 with a provision that excludes coverage for injury to the insured or any family member of the insured.

24-A M.R.S.A. § 2902-D. The argument made by the plaintiff based on this statute was rejected by the Maine Law Court in *Cash v. Green Mountain Ins. Co.*, 644 A.2d 456, 457-58 (Me. 1994). While the version of the statute in effect at that time differed somewhat from the current version, *id*. at 457 n.1, the differences are immaterial for purposes of the plaintiff's claims. Uninsured motorist coverage is not affected by this statute. *Id*. at 458. Contrary to the plaintiff's argument, Plaintiff's Memorandum at 5-6, the fact that the legislature amended this statute effective after *Cash* to delete a provision allowing such an exclusion if the insurer offered the insured the opportunity to buy such coverage has no effect whatsoever on the rationale of *Cash* or the Law Court's conclusion that the statute does not apply to uninsured motorist coverage.

Nothing in *Jack v. Tracy*, which did not deal with an exclusion for uninsured vehicles, requires a different result. The defendant is entitled to dismissal of Count I of the current complaint in this action pursuant to *Cash* and the terms of the policies at issue. Count II, the claim for loss of consortium, is derivative of Count I; the defendant accordingly is entitled to dismissal of that Count as well. Because the defendant had no duty to make further payment to the plaintiff under the policies, it is also entitled to dismissal of Count III.

II. The Motion to Amend

The plaintiff seeks leave to amend her complaint to add a fourth count alleging that the defendant is liable for the alleged negligence of the agent who sold them the policies at issue in "failing to advise the Maurices as to purpose of UM coverage, various coverages and their options,

thus providing inadequate monetary limits on the three automobile liability insurance policies," Plaintiff's Motion to Amend Complaint (Docket No. 11) at 2. This motion was filed on January 6, 2000. Docket. The deadline for filing amended pleadings set by the scheduling order in this case was December 20, 1999. Scheduling Order (Docket No. 6) at 1. The plaintiff attempts to excuse her belated filing of this motion by suggesting that it is based on information she first acquired during the deposition of the agent on December 22, 1999. Plaintiff's Memorandum of Law in Support of Motion to Amend Complaint ("Plaintiff's Memorandum") (Docket No. 12) at 2-3.

It is unnecessary to address the plaintiff's explanation for her delay in filing the motion for leave to amend her complaint because the proposed amendment, as written, is subject to dismissal itself. The plaintiff concedes, *id*. at 4, that, under Maine law, an insurance agent has no legal duty to advise or give information to an insured party concerning the adequacy of insurance coverage in the absence of a special relationship or agreement between the parties, *Szelenyi v. Morse, Payson & Noyes Ins.*, 594 A.2d 1092, 1095 (Me. 1991), yet she fails to allege the existence of such a relationship or agreement in her proposed Count IV. She argues that a special relationship existed between the defendant and her husband because "[t]he Maurices had been insured with State Farm since 1978 — 19 years prior to the occurrence of the alleged accident." Plaintiff's Memorandum at 4. This assertion, which also is absent from the proposed amendment, is insufficient to allege the existence of the necessary special relationship. *See Szelenyi*, 594 A.2d at 1094 (12 year course of dealings between plaintiff and insurance agent not sufficient to establish existence of special relationship).

In her reply memorandum, the plaintiff argues that the question whether a special relationship existed between the plaintiff and her husband and the insurance agent must be submitted to the jury.

Plaintiff Tina L. Maurice's Reply Memorandum in Support of Plaintiff's Motion to Amend Complaint (Docket No. 14) at 4. However, where the proposed amended complaint fails to allege the existence of a relationship critical to a cause of action, the plaintiff is not entitled to present her claim to a jury. *See, e.g., Roberts v. Florida Power & Light Co.*, 146 F.3d 1305, 1308 (11th Cir. 1998) (dismissal for failure to allege necessary element of cause of action); *see generally United States v. Loisel*, 39 F.Supp.2d 61, 64 (D. Me. 1998). That is the whole point of a motion to dismiss.

The plaintiff also argues that she is entitled to proceed with her proposed amendment as a third-party beneficiary of the contract between the defendant and the agent. *Id*. at 4-5. However, this claim is not presented in the proposed amendment, and the plaintiff only speculates about the content of that contract. Again, the plaintiff has failed to demonstrate that her proposed amendment, even when reasonable inferences favorable to her are drawn, states a claim against the defendant upon which she may recover.

A motion for leave to amend a complaint may be denied, notwithstanding the admonition of Fed. R. Civ. P. 15(a) that leave to amend "shall be freely given when justice so requires," if the proposed amendment would be futile. *Grant v. News Group Boston, Inc.*, 55 F.3d 1, 5 (1st Cir. 1995).

> "Futility" means that the complaint, as amended, would fail to state a claim upon which relief could be granted. In reviewing for "futility," the district court applies the same standard of legal sufficiency as applies to a Rule 12(b)(6) motion.

Glassman v. Computervision Corp., 90 F.3d 617, 623 (1st Cir. 1996) (citations omitted). Here, the plaintiff's proposed amendment would fail to state a claim, for the reasons discussed above. Accordingly, the motion for leave to amend should be denied.

III. Conclusion

For the foregoing reasons, I recommend that the defendant's motion to dismiss be **GRANTED** and that the plaintiff's motion for leave to amend the complaint be **DENIED**.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated this 24th day of February, 2000.

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David M. Cohen
United States Magistrate Judge